In the Supreme Court of the United States

OCTOBER TERM, 1924

MARGARET W. PEARSON AND J. R. PEARSON her husband, appellants
v.
THE UNITED STATES
No. 264

APPEAL FROM THE COURT OF CLAIMS

MOTION BY APPELLEE TO DISMISS OR AFFIRM

Now comes the Solicitor General of the United States and moves the court to dismiss the appeal or affirm the judgment in this case.

STATEMENT

This is an appeal by Margaret W. Pearson and J. R. Pearson, her husband, from a judgment of the Court of Claims sustaining a demurrer to their petition which questioned the sufficiency of the facts averred therein to constitute a cause of action against the United States within the jurisdiction of that court.

The action was instituted to recover $100,000 damages for the removal of buildings, fixtures, etc., by the United States under claim of title from

property leased from claimants through the Chamber of Commerce of Jacksonville, Florida.

THE FACTS

Substantially the following are the material facts alleged in the petition:

Claimants, being owners of a tract of land containing about 535 acres described in the petition, leased the same on September 11, 1917, to the Chamber of Commerce of Jacksonville, Florida, " for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire on the termination of said war should said war be terminated within three years from the date hereof." (Rec. 1.) The lease contained a covenant that all buildings, fixtures and/or other improvements placed in or upon the land during the term by the lessee, its successors or assigns, shall remain the exclusive property of the lessee, its successors or assigns, who may at any time during the term of the lease and within three months thereafter enter and remove the same. (Rec. 2.) The lease is set forth in the record at pages 9, 10, 11.

Within a short time after September 11, 1917, the Chamber of Commerce of Jacksonville verbally agreed with the War Department that the land

covered by the lease under consideration might be used as a portion of the lands upon which to lay out and construct a training camp for troops of the United States Army. The land thereafter became a part of Camp Joseph E. Johnston. The Chamber of Commerce consented and agreed with the United States that the demised premises might be occupied by the latter for the purposes outlined herein, and the claimants acquiesced and consented to such use and occupancy by the Government under and subject to the terms, conditions and provisions of the lease. (Rec. 2.)

The War Department erected extensive buildings upon the premises and placed extensive improvements thereon, laid pipes and conduits for water mains and other purposes; erected what was known as " base hospital " of Camp Joseph E. Johnston upon the land, including homes for nurses and such other buildings and structures as a necessary adjunct thereto; that said buildings were completely and fully equipped with all necessary appliances, facilities, plumbing, electric wiring, and because of the use to which the buildings were put, these appurtenances were more extensive and numerous than any other types of buildings and were of a higher quality. It is then alleged in paragraph 5 of the petition (Rec. 3) that by the Act of March 3, 1919, Section 2, c. 98, 40 Stat. 1302, Camp Joseph E. Johnston Hospital, together with its equipment, including sites and leases, was transferred to the

Treasury Department for the use of the Public Health Service. (Rec. 2, 3.)

It is further alleged that the lease from the claimants to the Chamber of Commerce of Jacksonville expired not later than three years from its date, or September 10, 1920, with an allowance of three months in which the buildings, fixtures, or other improvements may be removed from the demised premises, the last day thereof being December 10, 1920. (Rec. 3.)

On December 9, 1920, claimants wrote a letter to the Commanding Officer of Camp Johnston, requesting the removal of the property. In answer thereto the Commanding Officer informed claimants that he had no jurisdiction in the premises, stating that he had transmitted the letter to the Public Health Service, Hospital No. 33, Camp Johnston. (Rec. 3, 4.) Between January 10, 1921, and April 6, 1921, claimants corresponded with the United States Public Health Service relative to the removal of these improvements. On March 28, 1921, the United States Surgeon General addressed a letter to the attorney for claimants which in part reads (Rec. 6):

> Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until May 1, 1921.

In answer thereto claimants' attorney, under date of April 6, 1921, notified the Surgeon General

that at a conference between the writer and Major Goodwin, the officer in charge of the hospital property at Camp Johnston, it was stated by the claimants that under the terms of the lease all the buildings, etc., on the land were now a part of the property itself and legally were no longer subject to removal. Major Goodwin was to communicate further with his superior officers in Washington, and the understanding was that no further destruction of any buildings now standing on the demised premises or any further removal therefrom would be made without notice to claimants. (Rec. 7, 8.) Notwithstanding this agreement, the Government removed the buildings and improvements from claimants' land during the early part of 1921, wherefore claimants demand damages in the sum of $100,000. (Rec. 6.)

The Court of Claims sustained the demurrer of the United States, and dismissed the petition.

ARGUMENT

The United States has always claimed title to the property involved and has never in any way acknowledged any right thereto in the claimants as against itself. Therefore the claim is one sounding in tort, for which no suit can be maintained against the United States.

The claimants contend that the failure of the United States to remove all the improvements upon the demised premises within the time specified in the lease from claimants to the Chamber of Commerce, vested, by operation of law, the title thereto in them. Upon the premise that the title of the

Government to this property became forfeited in the manner described, the claimants further contend that the removal of the improvements thereafter was a taking of private property, for which the United States must pay just compensation under the Fifth Amendment.

Perhaps the most serious objection to that view, however, is that under the Constitution Congress has the exclusive power to provide for the acquisition and disposal of all public property. (Article IV, Section 3; 33 Ops. A. G. 288, 290; 32 Ops. A. G. 511, 515; 22 Ops. A. G. 546, 549.) In the absence of legislative authority no public officer has the right to transfer, by contract or otherwise, the title to property which is vested in the United States. Persons dealing with Federal officers are charged with notice of the limits which the law places upon their power to contract. So, in the case at bar, the claimants must show by affirmative allegation that the officers with whom they dealt had the authority to bind the Government to the extent claimed. This has not been done. Claimants are relying in support of their claim upon the false premise that the negligence of Federal officers will operate as a forfeiture of property owned by the United States. What can not be done directly can not be done indirectly.

The want of power to contract away the vested title of the United States to property can not be aided by indulging in implications which amount to nothing more than negligence or laches on the part

of Federal officers or agents. (*McLeod* v. *Sherman*, 98 U. S. 565; *Whiteside* v. *United States*, 93 U. S. 247; *Eastern Extension Co.* v. *United States*, 251 U. S. 355, 363.) There is no merit whatever in a claim which is based upon the theory that the laches or negligence of agents of the Government operates to divest it of its title to property. The doors of the public treasury can not be opened in that way.

A still further objection to the position taken by the claimants is the general rule of law that while parties may agree upon a specified time within which improvements made by a tenant shall be removed, such a provision is not an agreement for forfeiture on failure to remove, and failure to remove within the time limit merely precludes the lessee from entering without being liable for damages. (*Reader* v. *Christian* (Tex. Civ. App.) 234 S. W. 155.)

The lease does not provide that there shall be a forfeiture of the lessee's title to the improvements placed upon the demised premises in the event the buildings, fixtures, etc., are not removed within the time designated therein. The presumption is always in favor of the right to remove buildings which a tenant has placed on the leased premises for his own purposes. (*Ryder* v. *Faxon*, 171 Mass. 206; *Schneider* v. *Bulger* (Mo. App.), 194 S. W. 737, 739–740; *Poillon* v. *Gerry*, 179 N. Y. 14, 19; *Lewis* v. *The Ocean Nav. & Pier Co.*, 125 N. Y. 341, 346; *Donnelly* v. *Frick, etc., Co.* 207 Pa. 597.) Under the cases just cited, if we

disregard the immunity of the United States for the unauthorized acts of its agents and assume the status of a private citizen, it nevertheless had a right to remove its buildings, fixtures, etc., from the demised premises, its liability, if any, being merely for damages for a trespass.

Apart from the foregoing considerations, however, this case is controlled by *Hill* v. *United States* (149 U. S. 593–599), wherein the rule is announced that, where property is taken by the United States under claim of title adverse to any other person, no contract on the part of the Government to pay therefor can be implied.

Nowhere in the petition or in the record itself is there any intimation that the United States has ever recognized in any way any right of the claimants to the property in question. On the contrary, the correspondence between the agents of the Government and the claimants shows that the United States has always asserted its right to remove all buildings, improvements, fixtures, etc., upon the demised premises, on the ground that it alone had title thereto. In this situation no promise on the part of the United States to pay therefor will be implied. (*Tempel* v. *United States*, 248 U. S. 121, 130.) For, as stated by Mr. Justice Brewer for this court in *United States* v. *Lynah* (188 U. S. 445, 465):

> When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an

> officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own.

The fact that the claimants have framed their claim as upon an implied contract is of no avail (*Hill* v. *United States,* 149 U. S. 593, 598), for it is none the less a case sounding in tort. (*Hijo* v. *United States,* 194 U. S. 315, 323.)

It is submitted that the action is one sounding in tort for which the United States can not be sued in the Court of Claims, or in any other court.

CONCLUSION

The appeal should be dismissed or the order of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
DECEMBER, 1924.

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